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NO. 85-2001

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1985

EDWARD EVANS PETITIONER

V.

STATE OF ARKANSAS RESPONDENT

ON PETITION FOR WRIT OF
CERTIORARI TO THE ARKANSAS
COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

STEVE CLARK
ATTORNEY GENERAL

BY: THEODORE HOLDER
ASST. ATTORNEY GENERAL
201 E. MARKHAM
HERITAGE WEST
LITTLE ROCK, AR 72201
(501) 371-2007

ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE PETITIONER WAS DENIED THE DUE PROCESS OF LAW IN THE FOLLOWING PARTICULARS:

(a) WHETHER THE JURY VERDICT WAS IMPEACHED BY A JURORS STATEMENT AFTER THE TRIAL THAT IT WAS NOT HER VERDICT?

(b) WHETHER AN ARREST WARRANT WAS BASED ON HEARSAY AND THEREBY VITIATED THE CONVICTION?

(c) WHETHER THE PETITIONER WAS PROPERLY CONVICTED OF MULTIPLE CHARGES?

(d) WHETHER THE PROSECUTING ATTORNEY USED PEREMPTORY CHALLENGES TO SYSTEMATICALLY EXCLUDE BLACKS FROM THE JURY?

II.

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION?

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JURISDICTIONAL STATEMENT

The jurisdictional basis for this petition should be 20 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED, UNITED STATES CONSTITUTION, AMENDMENT 14.

No state shall make or enforce any law which shall abridge the privileges of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASONS FOR DENYING THE WRIT

I.

WHETHER THE PETITIONER WAS DENIED THE DUE PROCESS OF LAW IN THE FOLLOWING PARTICULARS:

(a) WHETHER THE JURY VERDICT WAS IMPEACHED BY A JUROR'S STATEMENT AFTER THE TRIAL THAT IT WAS NOT HER VERDICT?

In this issue the petitioner contends that the jury verdict was impeached by the later testimony of one of the jurors who swore in an affidavit that she would have voted for acquittal but for the other jurors assurance that one of the state's witnesses would never lie. This matter was presented in the trial court pursuant to a motion for new trial. The trial

court would not consider the affidavit of this juror, however, holding it to be inadmissible under Ark. Unif. R. Evid. 606. This is the same rule substantially as Fed. R. Evid. 606. As the advisory committee notes on Rule 606 show, this rule has its antecedents in the time of Lord Mansfield. This Court has held that verdicts are not to be lightly overthrown on such evidence. In this regard see McDonald v. Pless, 238 U.S. 264 (1915). How this matter presents a federal question worthy of this Court's consideration is neither stated or apparent. There appears to be no split in the Circuits or conflicts between the states highest courts and the

federal courts such that would militate for a grant of certiorari under Rule 17.1, Rules of the Supreme Court of the United States.

(b) WHETHER AN ARREST WARRANT WAS BASED ON HEARSAY AND THEREBY VITIATED THE CONVICTION?

The petitioner next argues that this Court should grant review in this case to determine whether the arrest warrants in this case were properly issued and his arrest constitutional. There is no evidence gained by the prosecution cited or other advantage gained by the state in this allegedly illegal arrest of the petitioner, so he must seek

simple vacation of his judgment and sentence in this matter. That an unconstitutional or illegal arrest, standing alone, will not void an otherwise valid subsequent conviction is well settled. In this regard see: United States v. Nobles, 422 U.S. 225 (1975); Gerstein v. Pugh, 420 U.S. 103 (1975). That the petitioner cannot prevail on this point is clear.

(c) WHETHER THE PETITIONER WAS PROPERLY CONVICTED OF MULTIPLE CHARGES?

The petitioner next argues in effect that he was subjected to double jeopardy by being convicted of multiple offenses

for the same course of conduct. Although not stated, the petitioner undoubtedly relies upon such cases as Whalan v. United States, 445 U.S. 684 (1980) and Blockburger v. United States, 284 U.S. 299 (1932). This matter was addressed by the Arkansas Court of Appeals on direct appeal and found wanting. As that court indicated in its opinion, the evidence showed terroristic threatening on three different occasions, thus warranting the convictions of which review is now sought. Also as noted by that court, the only conviction that could be called a lesser included offense was

dismissed by the trial court and the fine erroneously levied for conviction of that offense was ordered by the Arkansas Court of Appeals to be removed from the judgment. The convictions that remained were two counts of terroristic threatening and one count of harassing communications. Because none of these can be shown to have involved the same elements or to have been included one in another, the petitioner has not made out a case of double punishment for the same offense.

(d) WHETHER THE PROSECUTING ATTORNEY USED PEREMPTORY CHALLENGED TO SYSTEMATICALLY EXCLUDE BLACKS FROM THE JURY?

The petitioner next argues that the prosecuting attorney in this case systematically excluded blacks from the jury by use of his peremptory challenges. This Court has recently addressed this topic in Batson v. Kentucky, ____ U.S. ____, 106 S.Ct. 1712, 90 L.Ed.2d. 69 (1986). The Court held in that case that a defendant can establish a prima facie case of systematic exclusion by use of peremptory challenges by showing (1) that he is a member of an identifiable racial group and that the prosecuting attorney used peremptory challenges to remove members of that group from the

jury and (2) that other facts and relevant circumstances in the case raise an inference that the prosecuting attorney used those peremptory challenges to exclude jurors solely on the basis of race. In the case at hand this showing cannot be made, for, as the petitioner admits, three blacks sat on the jury. As the Arkansas Court of Appeals noted, it is as likely as not that the prosecuting attorney used his peremptory challenges to exclude other blacks from the jury for other reasons than their race.

II.

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION?

The petitioner entitles this second point whether he received a fair and impartial trial, but the body of the argument shows it to be one concerning the sufficiency of the evidence. The Arkansas Court of Appeals considered this argument and resolved it against the petitioner. Needless to say, the trial court also resolved that issue against the petitioner. Consequently, the petitioner now asks the Court to overturn the factual findings of two state courts below.

As stated in California Retail Liquor Dealers Association v. Midcal Aluminum, Incorporated, 445 U.S. 97, 111, 112 (1980):

> ...we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." Lloyd A. Fry Roofing Company v. Wood, 344 U.S. 157, 160, 97 L.Ed. 168, 73 S.Ct. 204 (1952).

The two major exceptions to this rule are aptly stated as follows in Fiske v. Kansas, 274 U.S. 380, 385, (1927):

> ...where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon a federal question, to analyze the facts.

See, also, Time, Incorporated v. Firestone, 424 U.S. 448 (1976).

The argument made in this brief is the same argument made to the Arkansas Court of Appeals, and there seems to be no reason to treat it any differently. More importantly, there is no constitutional issue involved in this matter.

CONCLUSION

The petitioner has not demonstrated that the decision of the Arkansas Court of Appeals is in conflict with any decision of other state courts, federal courts or this court. No violation of any of the decisions of this Court has been shown either. For this reason and the

reasons and authorities cited herein, the respondent submits that review by this court is not warranted and that the petition for writ of certiorari should be denied.

Respectfully submitted

STEVE CLARK
ATTORNEY GENERAL

by: THEODORE HOLDER
Assistant Attorney General
201 East Markham
Heritage West Bldg.
Little Rock, AR
72201
(501) 371-2007

ATTORNEYS FOR RESPONDENT